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Signed: August 08, 2005

Leslie Tchaikovsky
LESLIE TCHAIKOVSKY
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re No. 05-40485 TG
ROBERT McBRIARTY, Chapter 13
Debtor.

MEMORANDUM RE OBJECTION TO HOMESTEAD EXEMPTION

Creditors Terry McBriarty and Janice With ("Creditors") and Martha G. Bronitsky (the "Trustee"), the Chapter 13 Trustee, object to the above-captioned debtor's (the "Debtor") claim of a \$150,000 homestead exemption in real property located at 255 Camino Pablo, Orinda (the "House"). For the reasons stated below, the objections will be sustained.

The Debtor filed a chapter 13 bankruptcy petition on February 4, 2005. In Schedule C of his bankruptcy schedules, he claimed a \$150,000 homestead exemption in the House, which he valued at \$600,000, citing Cal. Civ. Proc. §§ 704.710-704.880.¹ He disclosed

¹The Debtor's marital relationship with his former spouse was severed before he filed for bankruptcy but the marital estate has still not been divided. Although the Debtor

1 that he no longer lived in the House which is currently occupied
2 by his former spouse and minor son. He based his claim to a
3 homestead exemption on Section 704.710(c). Section 704.710(c)
4 defines "homestead" as:

5 ...the principal dwelling (1) in which the
6 judgment debtor or the judgment debtor's
7 spouse resided on the date the judgment
8 creditor's lien attached to the dwelling, and
9 in which the judgment debtor or the judgment
10 debtor's spouse resided continuously
11 thereafter until the date of the court
12 determination that the dwelling is a
13 homestead.

14 He contended that, because the marital estate had not yet been
15 divided, his former spouse still qualified as his "spouse" for
16 purposes of Cal. Civ. Proc. Code § 704.710(c). In support of this
17 position, he cited In re Miller, 167 B.R. 202 (Bankr. C.D.Cal.
18 1994). Miller did not deal with an objection to a debtor's claim
19 of a homestead exemption. Rather, it dealt with whether the
20 nonfiling former spouse's share of the community property was
21 property of the estate pursuant to 11 U.S.C. § 541(a)(2). In
22 Miller, as here, the marital status had been severed but the
23 marital estate had not been divided. Section 541 provides that
24 the bankruptcy estate includes "[a]ll interests of the debtor and
25 the debtor's spouse in community property as of the commencement
26 of the case..." 11 U.S.C. § 541(a)(2). The debtor contended that
her former spouse qualified as her "spouse" within the meaning of

25 apparently executed a deed of his interest in the House to his
26 former spouse before filing his bankruptcy petition, it appears
to be undisputed that he still has an ownership interest in the
House.

1 § 541(a)(2). The Miller court agreed, declining to follow a prior
2 bankruptcy court decision on similar facts. See In re LaNess, 159
3 B.R. 916 (Bankr. C.D. Cal. 1993); see also In re Mantle, 153 F.3d
4 1082, 1085 (9th Cir. 1998)(citing Miller with approval).

5 In support of their objection, Creditors cite In re Lawley,
6 130 B.R. 568 (Bankr. E.D. Cal. 1991), which did involve an
7 objection to a claim of a homestead exemption. In Lawley, there
8 was no dispute that the debtor was entitled to claim a homestead
9 exemption. The debtor had been awarded the family home as his
10 sole and separate property. The issue was whether he was entitled
11 to the enhanced amount of exemption available to a "member of a
12 family unit" residing in the house. The Lawley court concluded
13 that he was not. The debtor's former spouse had primary physical
14 custody of the couple's minor children. The debtor had only joint
15 legal custody and visitation rights. Thus, the Court concluded
16 that the debtor was limited to the exemption amount available to
17 a single person.

18 The Court finds neither case determinative of the issue
19 presented here. The question here is neither whether a former
20 spouse qualifies as a "spouse" for purposes of 11 U.S.C. §
21 541(b)(2) nor the amount of the homestead exemption to which a
22 debtor who lives in the homestead is entitled under state law.
23 The question is whether a former spouse qualifies as a "spouse"
24 for purposes of Cal. Civ. Proc. Code § 704.710(c). The Court
25 concludes that she does not. It bases this conclusion on Cal.
26 Civ. Proc. Code § 704.710(d) which provides that "spouse" does not

1 include one to whom the debtor is still married if an order of
2 legal separation has been entered. Given this provision, it would
3 make no sense to conclude that "spouse" includes one to whom the
4 debtor is no longer legally married.

5 **CONCLUSION**

6 The Creditors' and Trustee's objections to the Debtor's claim
7 of a homestead exemption are sustained. Counsel for the Creditors
8 are directed to submit a proposed form of order in accordance with
9 this decision.

10 END OF DOCUMENT

COURT SERVICE LIST

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